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No. 17396

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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HARVEL H. COSPER AND STELLA COSPER,

*Appellants,*

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

*Appellee*

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APPELLANTS' REPLY BRIEF

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## STATUTES PRESENTED

Rule 30, Federal Rules of Criminal Procedure

Rule 51, Federal Rules of Civil Procedure

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

## REPLY ARGUMENT

### REPLY TO APPELLEE'S ARGUMENT (A)

Appellee cites numerous cases, some of which stand for the proposition that impossibility by reason of an act of God or some other cause is an excuse for non-performance of a contract. Appellants submit that the "Contested Instruction", as defined in Appellee's Answering Brief, is not an instruction on that issue at all. The trial court clearly stated that the question before it was whether the jury could return a verdict in favor of plaintiff with no money damages if the jury found that defendants had an obligation to keep the dike and ditch in repair, that it was breached, but that the plaintiffs were not damaged. (TR p. 16) The jury foreman, in clarification, stated that TR p. 17 that even though damage, the damage was caused by an act of God, but the jury found that there was an obligation to maintain the ditches and dikes. In answer to this question the contested instruction was given. In this context, then, the contested instruction is clearly an erroneous statement of law in that it charges the jury that if there was a contract and that contract is breached, but the damage claimed is caused by an act of God, then the jury may not give the plaintiff a nominal verdict for that breach, but must return a verdict for defendant. Appellants respectfully submit that the case cited in Appellants' Opening Brief adequately established that the correct rule of law is that a breach of contract always gives rise to a claim for relief with or without damage, and if no damage, plaintiff is entitled to a nominal verdict.

### REPLY TO APPELLEE'S ARGUMENT (B)

Appellee cites Rule 51 of the Federal Rules of Civil Procedure and claim that Appellants cannot assign the contested instruction as error because the record does not indicate an objection by Appellants to preserve the question for review. Appellants respectfully submit that this is not the law and refer the Court

to the last sentence of Rule 51 of the Federal Rules of Civil Procedure: "Opportunity shall be given to make the objection out of the hearing of the jury." In *Schaffer v. United States*, 221 F. 2d. 17 the Court, in construing Rule 30 of the Federal Rules of Criminal Procedure, which is indential to Rule 51 of the Federal Rules of Civil Procedure, stated at p. 22:

The government insists that such specifications of error are not properly before this Court because Counsel failed to make their objections before the jury retired to consider its verdict as required by Rule 30 of the Federal Rules of Criminal Procedure.

The Court concluded its charge to the jury with the statement, "All right, you may retire", whereupon the jury retired. Defendant's Counsel then stated to the Court that they desired to make certain objections and the Court replied, "You may state it right now." Whereupon the objections hereinafter considered were fully stated. Unless the Court understood that by giving Counsel permission to state their objections after the jury retired, it might even then recall the jury for any necessary correction of the charge, it did not observe the duty imposed upon it by the last sentence of Rule 30, *supra*, "Opportunity shall be given to make the objection out of the hearing of the jury." We agree with what Chief Judge Parker of the Fourth Circuit said in *Lovely v. United States*, 169 F. 2d 386, 391, that

"... Counsel should not be required in the presence of the jury to place themselves in the attitude of apparent antagonism to the trial judge which is involved in excepting to the charge."

In accord with *Schaffer v. United States*, *supra*, and *Lovely v. United States*, 169 F. 2d 386, is *Bostwick v. United States*, 218 F. 2d 790 and in the *Bostwick* case the Court refers to Rule 51, Federal Rules of Civil Procedure, as well. The partial transcript contained in TR Pp. 14-17 clearly indicates that the Court provided no opportunity for Counsel to object to its charge to the jury:

"The Court: Very well, Have I answered the questions that you had now?

The Foreman: Yes, your Honor, you have.



The Court: Well then, supposing you retire then and continue your deliberations.

Counsel for Appellants did object in chambers, but, of course, the record cannot indicate this. It will also be noted at TR p. 4 that the jury returned a verdict within 15 minutes after retiring. Appellants submit that Rule 51 must be interpreted to excuse the failure to object as there was no opportunity given to object and there was no opportunity given to make the objection out of the hearing of the jury before the jury retired.

### CONCLUSION

It is clear that the contested instruction is an erroneous statement of the law, when considered in proper context and that under the circumstances shown on the face of the record Appellants are excused from demonstrating by the record that an objection was made to the Court concerning the contested instruction.

WHEREFORE Appellants again respectfully urge that the errors committed by the trial court can only be corrected by the reversal of the judgment and the trial court's order denying Appellants' motion for a new trial and remanding this case with the direction that a new trial be had.

Respectfully submitted,  
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